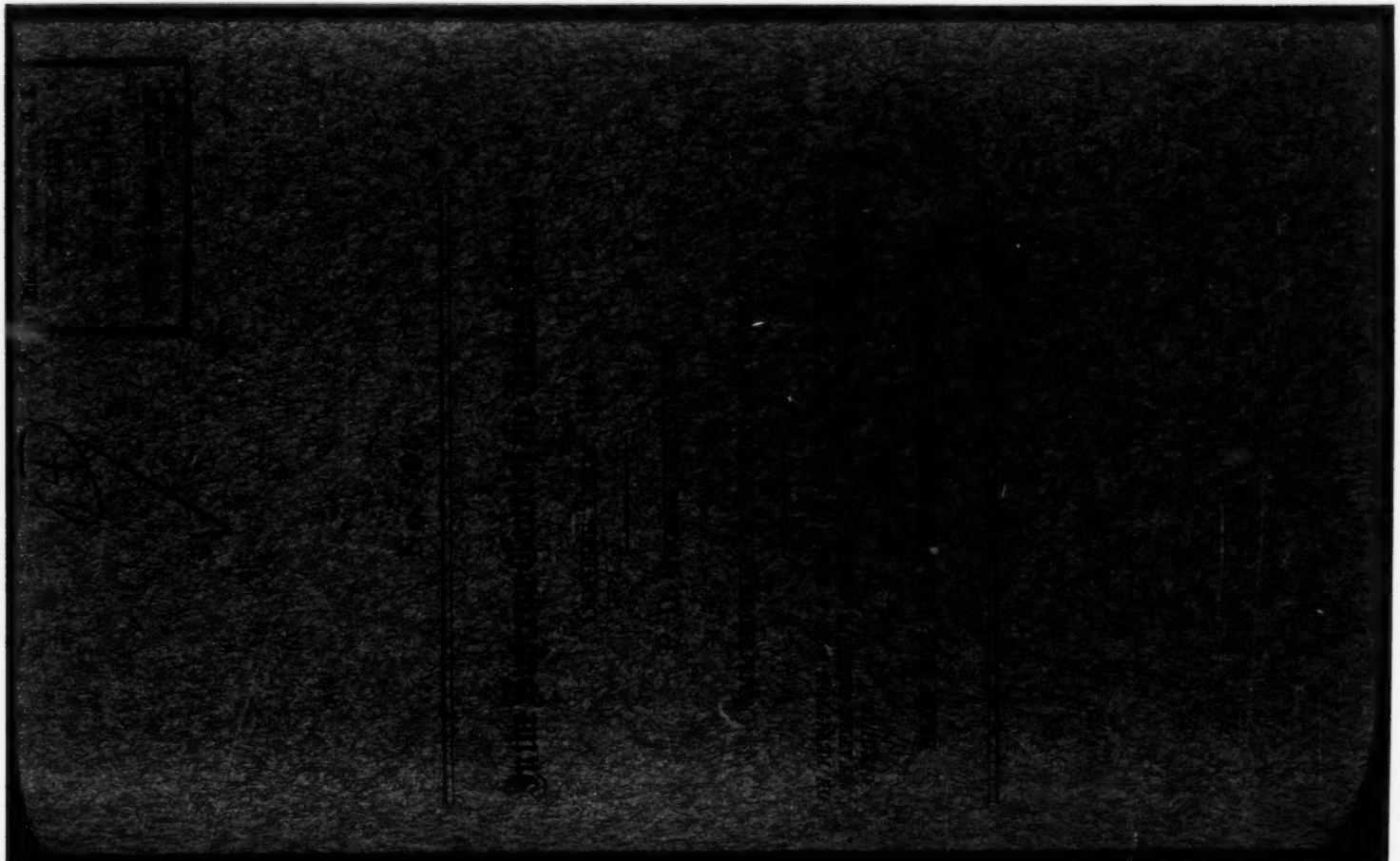

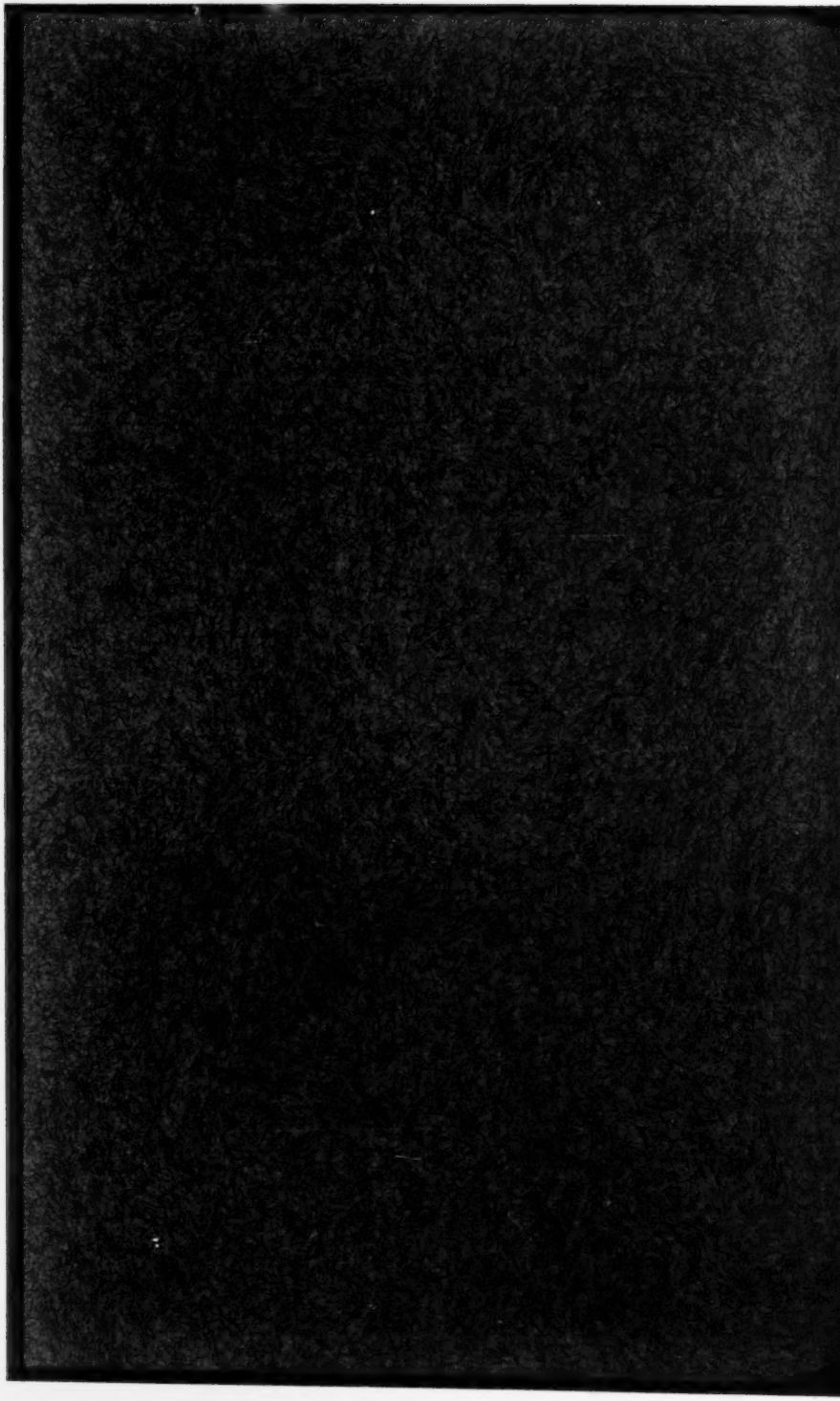

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 595

P. D. GEORGE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 10–24) is unreported. The opinion of the circuit court of appeals (R. 44–53) is reported in 143 F. 2d 837.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 17, 1944 (R. 54). The petition for a writ of certiorari was filed on October 13, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the grantor of a family trust, the corpus of which consists of shares of stock of a corporation which was managed and controlled by the grantor, is taxable on the income therefrom, under Section 22 (a) of the Internal Revenue Code where he names himself and two other individuals as trustees with broad powers of management, and reserves the power to change the shares of beneficial interest in the income and principal of the trust fund, although he cannot direct payment to himself or his estate.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra,* pp. 12–17.

STATEMENT

The Tax Court found the following facts (R. 11–15):

On December 23, 1939, the taxpayer created a trust naming himself and two other individuals as trustees. Neither of the other two trustees is related to the taxpayer. The taxpayer transferred 640 shares of the capital stock of the P. D. George Company to the trust. (R. 11.) Under the trust instrument the trustees are given broad powers of management. The trust instrument provides, *inter alia,* that the assets thereof are to be divided into seven parts. The income of the first of such parts is to be paid to one son, Pericles

F. George, in quarterly or other convenient installments for life, or in certain eventualities to his wife and children, and, on his death, the corpus is to be distributed to his then living children and to the descendants of any child then dead, per stirpes. The entire net income of the remaining six parts is to be paid to the six other sons equally, in quarterly or other convenient installments, until five years after the death of the taxpayer, at which time the corpus of those parts then remaining is to be distributed to the six sons or, in the event of the death of any of them before the period of termination, to his descendants, per stirpes. Article Three of the trust instrument provides, *inter alia,* that (R. 35–36)—

> In the event of the death of any of Grantor's seven (7) sons leaving no descendant then living, the share held for such son shall go to the others of Grantor's said seven (7) sons, and to the descendants then living, per stirpes, of any of them who have died, * * *
>
> * * * * *
>
> If all of Grantor's said six (6) sons and the said children of Pericles Francis George should die before their respective shares have been paid over to them, free from trust, and no descendant of any of them is living to take the trust estate, then upon the death of the last survivor of them and Pericles Francis George, the trust estate shall be paid over and distributed to the

persons who may then be the heirs at law of the Grantor, according to the laws of the State of Missouri then in force.

Article Six of the trust instrument provides as follows (R. 36–38):

These trusts are created and the interests of the beneficiaries, hereinbefore set out, shall be vested, but subject however to divestiture as follows:

1. The Grantor may at any time and from time to time modify or alter this indenture and the disposition of the trust property and the estates and interests therein created and the income arising therefrom, but in the following particulars only:

(A) By disposing of the income derived after any such modification or alteration becomes effective otherwise than as originally provided in this indenture, or otherwise than as provided by any amendment, by altering the proportion or amount of such income to be paid to or applied to the use of any one or more of the beneficiaries, by cancelling the share of any one or more of the beneficiaries in whole or in part, by substituting any beneficiary or beneficiaries in the place of any one or more of them, by adding to the number of beneficiaries, by providing for the proportion or amount of income to be paid or applied to the use of such additional or substituted beneficiaries; provided, however, that in no event shall any such modification or alteration (one or

more) direct, permit or allow the said income to be accumulated for or paid or applied to or for the use or benefit of the Grantor.

(B) By directing the distribution of the principal of any of the trust estates, as the same shall be constituted at any time, otherwise than as originally provided in this indenture, or otherwise than as provided by any amendment, by altering the proportion or the amount of the principal of any of the trust estates to be assigned, paid, and set over to any one or more of the beneficiaries, by cancelling the share of any one or more of the beneficiaries in whole or in part, by substituting any beneficiary or beneficiaries in the place of any one or more of them, by adding to the number of said beneficiaries, by providing for the proportion or amount of the principal of any of the trust estates to be assigned, paid, and set over to such additional or substituted beneficiary, or for the manner in which all or any part of said principal shall be divided or distributed upon the termination of the trusts; provided, however, that in no event shall any such modification or alteration direct, permit or allow any part of the principal of the trust estates to be paid or applied to or for the use or benefit of the Grantor or his estate.

(C) Any modification or alteration of this indenture provided for in subdivisions (A) or (B) of this Article Six must be by instrument in writing duly executed by the

> Grantor and delivered to the Trustees and shall become effective thirty (30) days next following the delivery of such instrument.
>
> 2. The Grantor may at any time and from time to time direct the Trustees to distribute, free from trust, any share of a beneficiary, in whole or in part, to the beneficiary who shall be then entitled to the income currently distributable therefrom; provided, however, that any such direction must be by instrument in writing duly executed by the Grantor and delivered to the Trustees, and shall become effective on the delivery of such instrument, and the Trustees shall immediately make distribution as in such instrument directed.

The trust instrument provides further that while the taxpayer is serving as a co-trustee he is to receive one-half of the compensation to be paid to the trustees for their services rendered to the trust; the other half is to be divided equally between the other trustees. The taxpayer has never exercised his power under the above-quoted Article Six to change the interests of the beneficiaries. (R. 13.)

During the taxable year, the youngest of the taxpayer's sons was 29 years of age and the oldest was 43 years of age. For many years prior to December, 1939, and continuously since that time, the seven sons have been married and living apart from the taxpayer and apart from each other. During 1939, and for many years prior thereto,

each of the seven sons had an independent income, in addition to his share of the trust income in 1939, and maintained himself and his family. The trustees adopted the calendar year as the accounting period of the trust and reported the income of the trust for each calendar year ending December 31. (R. 13–14.)

During 1939, prior to the creation of the trust for the benefit of the taxpayer's sons, the taxpayer owned all of the 1,000 shares of the P. D. George Company. The stock then had a value of $700 a share. In addition to the transfer of the 640 shares to the trust for the benefit of his sons, the taxpayer transferred 60 shares of such stock by gift on December 23, 1939. At no time during 1939 did the taxpayer own assets in excess of $50,000, except for the stock in the P. D. George Company. The income tax return of taxpayer for the taxable year shows that he received $15,000 as salary from the P. D. George Company; dividends in the amount of $38,519.38, including dividends from the P. D. George Company of $36,000; interest in the amount of $647.23; $960 as trustee's fee in the P. D. George trust; and that his net income was $49,896.89. (R. 14.)

Between December 23, 1939, when the trust was created, and December 31, 1939, the gross income received by the trustees amounted to $76,800, all of which was distributed before December 31, 1939. Of this amount $74,880 was

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distributed to the seven sons and $1,920 to the trustees for services as provided under the terms of the trust instrument. On his federal income tax for 1939, the taxpayer reported in his gross income his share ($960) of trustees' commissions, but did not report any other part of the $76,800. The Commissioner denied the total trustees' commissions as a deduction from the income of this trust and increased the taxpayer's income by the total amount of the gross income of the trust on the ground that such amount was taxable to the taxpayer under Section 22 (a) of the Internal Revenue Code. In the Tax Court, it was stipulated that the amount of such increase was excessive by the amount of $960. (R. 14–15.)

The Tax Court found (R. 17) that the taxpayer "retained an interest in the corpus of that trust [for his sons] substantially equivalent to continuing ownership thereof", and held that the Commissioner did not err in including in taxpayer's income the $75,840 (R. 18). The court below affirmed (R. 53).

ARGUMENT

Both the Tax Court and the court below held that the taxpayer remained in substance the owner of the trust funds within the meaning of *Helvering* v. *Clifford,* 309 U. S. 331, and we submit that there can be little doubt as to the correctness of such holding. It is in line with decisions in the

Second and Third Circuits (*Commissioner* v. *Buck,* 120 F. 2d 775 (C. C. A. 2d); *Hyman* v. *Nunan,* 143 F. 2d 425 (C. C. A. 2d); *Brown* v. *Commissioner,* 131 F. 2d 640 (C. C. A. 3d), certiorari denied, 318 U. S. 767; *Foerderer* v. *Commissioner,* 141 F. 2d 53 (C. C. A. 3d)) and is not in conflict with any decision of this Court or any circuit court of appeals.

In support of the application for certiorari, the taxpayer asserts a conflict with numerous cases (Pet. 6–7), apparently placing his chief reliance upon *Knapp* v. *Hoey,* 104 F. 2d 99 (C. C. A. 2d); *Commissioner* v. *Buck, supra;* and *Commissioner* v. *Bateman,* 127 F. 2d 266 (C. C. A. 1st). True, *Knapp* v. *Hoey* held the grantor not accountable for the trust income even though he had retained the power to shift shares of beneficial interest in the trust. But the decision was grounded upon Section 166 of the Revenue Acts of 1928 and 1932, relating to revocable trusts; it antedated the *Clifford* case and the Government did not assert taxability under Section 22 (a). In a later case in the same circuit, *Commissioner* v. *Buck, supra,* the court followed *Knapp* v. *Hoey* with respect to Section 166 but took the view (p. 778) that it was of no assistance in construing Section 22 (a), and held the grantor accountable under that Section in the light of the *Clifford* case. Since the *Buck* case was decided in the Commissioner's favor, it is diffi-

cult to understand the contention of the taxpayer here that it conflicts with the decision below. The *Bateman* case was decided in favor of the taxpayer; but there the grantor did not retain as much control over the trust property as retained by the grantor herein or by Buck in his case; and, indeed, the court in the *Bateman* case expressly distinguished the *Buck* case, saying (p. 270), that it was "an easy case for applying the *Clifford* principle".

The taxpayer also urges that during the tax year in question (1939) he had no power to control the disposition of the income because the trust was created on December 23, 1939, and he was required, under the terms of the trust instrument, to give 30 days' notice if he wished to exercise his power to change the beneficiaries. But since the taxpayer was the owner of the corpus, this argument has no vitality under the *Clifford* rule, and both the Tax Court (R. 19–20) and the court below (R. 53) so held. There is nothing in *Helvering* v. *Stuart,* 317 U. S. 154, to cast any doubt on the ruling below, for the *Stuart* case is in no way a departure from the rule of the *Clifford* case and other similar cases (*Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579).

Finally, we submit that the instant situation comes within the scope of *Dobson* v. *Commissioner,* 320 U. S. 489, 501, rehearing denied, 321

U. S. 231, and since it cannot be said that the decision of the Tax Court is without warrant in the record or that it lacks an adequate basis in the law, the decision must stand. The court below upheld this view (R. 53).

CONCLUSION

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

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OCTOBER, 1944.